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****

PETITION FOR WRIT OF CERTIORARI

87-388

No. _____

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

OCTOBER TERM 1987

JOHN LORMAND,

Petitioner

VERSUS

Aries Marine Corporation, et al,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the Jones Act is being applied in a uniform manner throughout the Circuit Courts insofar as defining the term "seaman".

2. Whether the question of seaman status under the Jones Act is a proper subject for summary judgment against an employee working aboard a vessel in navigation.

3. Whether the captain of a vessel, with knowledge that his gangway is not secured and is sliding off of its support, has a duty to intervene on behalf of longshore-type employees and have the gangway secured.

INTERESTED PARTIES

1.	John Lormand	Petitioner
2.	International Moorings & Marine, Inc.	Respondent
3.	The Fidelity & Casuality Insurance Company of New York	Respondent
4.	Aries Marine Corporation	Respondent
5.	Standard Marine Underwriters, Inc.	Respondent
6.	Glacier General Assurance Company	Respondent
7.	South State Insurance Company	Respondent

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN LORMAND,

Petitioner

versus

THE SUPERIOR OIL COMPANY et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, JOHN LORMAND, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on June 5, 1987.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals appears in the appendix.

The memorandum ruling of the United States District Court for the Western District of Louisiana, Lafayette Division, on the motion for summary judgment appears in the appendix.

The findings of fact of the United States District Court for the Western District of Louisiana, Lafayette Division, appears in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 5, 1987. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 45, Section 51:

> **§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined**
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall

be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

United States Code, Title 46, Section 688:

§ 688. **Recovery for injury to or death of seaman**

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may,

at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statues of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

* * *

United States Code, Title 33, Section 905:

§ 905. **Exclusiveness of liability**

* * *

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any

agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

* * *

STATEMENT OF THE CASE

The plaintiff was employed by International Moorings and Marine, Inc., (IMM) as a welder assigned to its welding crew stationed on board the RAM V, a jack-up barge owned by Aries Marine Corporation (Aries). Plaintiff's employer had contracted with The Superior Oil Corporation to perform welding services, and the RAM V was contracted to Superior as a support vessel to conduct operational and maintenance services for various offshore facilities owned by Superior and situated on the outer continental shelf off the Louisiana

coast. This jack-up barge was a special purpose vessel designed to operate in coastal waters. She was equipped with steel legs which could be jacked down to the sea bed and used as supports to elevate her to a desired height adjacent to offshore oil well structures.

The lower court granted a summary judgment in favor of plaintiff's employer denying seaman status to the plaintiff, dismissing the employer as a defendant, and denying plaintiff a jury trial since there was no diversity between plaintiff and all defendants. The trial judge then heard the evidence and ruled against the plaintiff holding that the vessel owner was not negligent or otherwise liable.

The Circuit Court concluded that the findings were not clearly erroneous and affirmed.

The details of the accident are as follows:

On November 16, 1983, the RAM V sidled up to Superior's platform and was elevated by the captain to the desired height above the surface. The ship's gangway was then placed between the vessel and the platform with the assistance of the ship's crane. The captain personally observed the placement of the gangway from the wheelhouse and observed that it was not secured. He admittedly concluded that it was dangerous because it would have a tendency to "walk off" the structure with the movement of the sea, but he took no action to have it secured because he accepted the estimate of an unidentified person that the work in progress would last only a brief time–somewhat less than he estimated for the gangway to creep off the structure and fall into the sea.

The IMM welding crew began attaching a metal walkway, which they had pre-fabricated on the deck of the RAM V, to the outside of the platform. Plaintiff assumed a work position on the ship's gangway and, as he was welding one of the metal pipes to the platform, the gangway fell away

beneath him, causing him to fall into the sea and sustain the injuries for which he claims damages.

Plaintiff's assignment at the time of the accident was for the duration of the job, and he actually remained with the vessel until it returned to port. For approximately eight hours before the accident, the welding crew had assembled the metal walkway to be attached by them to the platform. All of this work was done on board the vessel–sometimes while it was in a jacked-up position and sometimes while it was underway. Plaintiff had worked exclusively on board the vessel except for the ill-starred stint on the gangway.

REASONS FOR GRANTING WRIT

1. **There is need to resolve a conflict between the Circuit Courts and to define the term "seaman" as used in the Jones Act.**

There is no uniform rule among the federal courts of appeal defining the term "seaman" for purposes of Jones Act coverage. John Lormand suffered personal injuries when the gangway of the vessel to which he was assigned fell with him to the darkness of the sea below some two hours after it had been set in place. Unquestionably, someone was negligent. Recovery by Lormand against the vessel for serious injuries which he sustained depends initially on whether he qualifies as a seaman within the meaning of the Jones Act. If not, as a maritime employee of an independent contractor aboard the vessel, recovery is limited as provided by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A., Sec. 905(b).

Since the Jones Act is Federal law, it is to be given a single, consistent interpretation throughout the circuits. As stated by this Court in *So. Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), ". . . [t]he Constitutional grant

of admiralty jurisdiction to the federal courts requires a nationally uniform system of maritime law . . .". As shown below, this has not been the case. The circuits have struggled to find the proper test to determine whether each given claimant has obtained "seaman status" so as to gain coverage by the Jones Act. While the circuits have articulated various and often conflicting tests, the Supreme Court has remained virtually silent except for two per curiam opinions in 1958–*Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S.Ct. 657, 2 L.Ed.2d 737 (1958) and *Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958). Each case involved the question of seaman status and in each the lower court held as a matter of law that the plaintiffs were not seamen. The Supreme Court reversed each without explanation, simply stating that this was a question for the jury. The Court never articulated the proper test with which the jury is to determine such status and, as a result, there is still much confusion and much litigation on this issue.

Since 1959, the Court of Appeals for the Fifth Circuit has generally followed the opinion of *Offshore Co. v. Robison*, 266 F.2d 769, providing that seaman's status presents a jury question where (1) the worker was permanently assigned to or did a substantial portion of his work on a vessel, and (2) where his work contributed to the function of the vessel, the accomplishment of its mission, or its operation or welfare. In adopting this test, the Fifth Circuit omitted language from the earlier decision of *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953), requiring additionally that the plaintiff's work aboard the vessel be "primarily in aid of navigation."

Robison, in its original state, was the accepted rule when Lormand presented himself to the court and it seemed obvious then that the question of seaman's status was one for submission to the jury; albeit the district court disagreed.

Had the matter been lodged in the Third or the Seventh rather than the Fifth Circuit, the opposite conclusion would logically have resulted because the Seventh Circuit had then concluded that the existing case law had failed to develop a uniform or consistent interpretation of the term "seaman", and that the *Robison* test "accords insufficient weight to the relationship between the employee and the transportation function of the vessel". *Simko v. C. & C. Marine Maintenance Co.*, 594 F.2d 960 (CA 3), cert. denied 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979); *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (CA 7), cert. denied (1985), 469 U.S. 1211, 105 S.Ct. 1180, 84 L.Ed.2d 328.

To add to the confusing state of the law, the Fifth Circuit decided the case of *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (CA 5 1986) (en banc), while the Lormand case was pending on appeal. The *Barrett* decision dramatically altered the *Robison* test for seaman's status by requiring that status be determined in light of the employee's entire employment with his current employer unless there has been a permanent change of his job assignment. *Barrett* was decided by a splintered bench with four judges concurring in the result but expressly wanting to adopt the Seventh Circuit rule as enunciated in *Johnson*, and with six judges dissenting. The case stands as a monument to the total division of legal thought within the circuit and illustrates the crying need for a uniform rule.

The *Barrett* dissent written by Judge Rubin strongly critized the strict interpretation taken by the majority, stating that "the majority's requirement that such a change reflect a 'permanent' change in job assignment is inflexible and contrary to the rationale underlying *Robison*." 781 F.2d at 1077. Judge Rubin also pointed out that, though the majority opinion correctly summed up the decisions of the Supreme Court in *Gianfala v. Texas Company*, 350

U.S. 879, 76 S.Ct. 141, 100 L.Ed 775 (1955), *Senko v. La-Cross Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957), *Grimes v. Raymond Concrete Pile Co., supra*, and *Butler v. Whiteman, supra*, all holding that the question of seaman status is for the jury and is to be determined by the worker's assignment *when he is injured* and not by the general characterization of his work, it then ruled in conflict with these decisions. 781 F.2d at 1078.

Thus, as stated by the Court in *Dungey v. United States Steel Corp.*, 499 N.E.2d 545 (Ill.App. 5 Dist. 1986), "[e]ven in the Fifth Circuit, however, where most of the litigation involving seaman status has occurred, there has been considerable inconsistency in the cases." 499 N.E.2d at 550. Likewise, Professors Gilmore and Black observe that "[e]ven in a circuit as steeped in admiralty law as the Fifth, the plaintiff's fate, in cases of this sort, seems to depend on the luck of the judicial draw." G. Gilmore and C. Black, *The Law of Admiralty*, § 6-20 att 334 (2d Ed. 1975).

Thus, not only is there inconsistency between the circuits, but within the circuits as well. It is grossly unjust that while all claimants are to be governed by the same law, the availability of coverage from the Jones Act largely depends on where the incident occurred or the action is brought, rather than on the facts of the particular case. There is accordingly a pressing need for the Supreme Court to speak on this matter and set guidelines for the determination of this critical issue of "seaman status". Noted by Professors Gilmore and Black,

> "[a]fter a half century of litigation the answer to the riddle is not apparent. The Supreme Court has alternated between giving the term 'seaman' an exceedingly broad construction and giving it a much narrower

> one. Consequently defendants have been encouraged to argue, in all but the most obvious cases, that plaintiff is not a Jones Act seaman and that the action must be dismissed. Thus there has always been, there continues to be, and presumably there will go on being a substantial volume of depressing litigation of this type." G. Gilmore and C. Black, *The Law of Admiralty*, § 6-21 at 328 (2d Ed. 1975).

Plaintiff respectfully urges that the Supreme Court address this issue and put an end to the long-existent riddle.

2. **The courts below erred in refusing to adhere to the liberal mandate of the Jones Act and allow the issue of seaman's status to be decided by a jury.**

The Jones Act is remedial legislation which is to be given a benevolent interpretation, the seaman having no other damage remedy save unseaworthiness. *Cosmopolitan Shipping Company v. McAlister*, 337 U.S. 787 (1949, reh. den. 338 U.S. 839); *Cortez v. Baltimore Insular Mine, Inc.*, 287 U.S. 367 (1932). As stated by the Fifth Circuit in *Offshore Company v. Robison*, 266 F.2d 769, (5th Cir. 1959), "expansion of the terms seaman and vessel are consistent with the liberal construction of the Jones Act that has characterized it from the beginning and is consistent with its purposes." *Robison* at 780.

To maintain his Jones Act claim, the plaintiff must be found a "seaman". This term has been given a wide variety of interpretation over the years and has been the center of much litigation. The Fifth Circuit has held that to obtain seaman status a worker must establish (1) that he is assigned permanently to a vessel in navigation or he performs a substantial part of his work on a vessel or fleet of vessels

and (2) that his work contributes to the function of the vessel or to the accomplishment of its mission. *Offshore Company v. Robison, supra*; *Barrett v. Chevron*, 752 F.2d 129 (5th Cir. 1982).

The first requirement of *Robison* is really two faceted but the plaintiff essentially qualified under either one. As to his "more or less permanent assignment to the vessel", the evidence shows that he was called out by the IMM foreman to join the crew aboard the RAM V and to stay with the job until its completion. This is exactly what he did. He worked on the vessel until completion of the job and returned to port with the vessel.

There is really very little question about plaintiff's performance of a substantial part of his work on board the vessel. All of the evidence shows that he was totally quartered on board, all of his equipment, tools and supplies were on board, and he did all of the fabrication work on board, leaving to be done on the platform only those welds necessary for attachment to the platform.

Likewise, as to the final *Robison* requirement, there is little question but that the capacity in which Lormand was employed and the duties which he performed contributed to the function of the vessel or the accomplishment of its mission. The jack-up barge essentially acted as a support for offshore oil field work such as welding, diving, and wireline activities. It required a crew of welders and such to accomplish its mission, and Lormand was one of those workers.

Wherein then did Lormand fail? Unfortunately for Lormand, the Fifth Circuit decided *Barrett v. Chevron, supra*, while his case was pending on appeal, and the *Barrett* case brought about a change in the manner of determining seaman's status. Status as to him had been fixed below by summary judgment with no opportunity for a full trial on the new issue of "employment history" created by *Barrett*.

The view taken by the Fifth Circuit following *Barrett* was that Lormand's entire history of employment showed that he had worked only 14% of the time on board vessels so seaman status was properly denied as a matter of law, regardless of what he was doing at the time of the accident. Plaintiff urges that in light of these facts and in view of the liberal interpretation intended for the Jones Act, the summary denial of seaman status in this case was clearly erroneous and directly in conflict with the decisions of this Court.

It has long been the policy of this Court that the finding of seaman status is to be determined by a jury. Early in the case of *Gianfala v. Texas Company, supra*, a jury found the plaintiff to be a seaman. The Fifth Circuit Court reversed, stating that the question of status, on undisputed facts, was a question of law and was to be resolved by a judge. This court reversed, remanding the case with directions for the district court to reinstate its judgment, illustrating this court's refusal to accept the effort by the Fifth Circuit to narrow the interpretation of "seaman" and to create circumstances where it becomes a question of law.

Later, in *Senko v. LaCross Dredging Corp., supra*, after the state court jury found the plaintiff to be a seaman, the Illinois appellate court reversed. The plaintiff's duties included splicing rope, storing supplies, cleaning and maintaining an anchored dredge barge. This court reversed the appellate court ruling, stating that the finding of seaman status was to be left to the jury. 352 U.S., at 374.

Again in *Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958), the decedent was injured while cleaning the boilers of a tug which was out of navigation. He was employed by the defendant to do odd jobs around the defendant's wharf, barge, and tug. This court stated, without any explanation, that the question of status was a jury question. 356 U.S., at 271.

In light of the above jurisprudence, summary judgment in this case was clearly improper. As stated by the Fifth Circuit in *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832 (5th Cir. 1982), concerning summary judgment, "since, if granted, they deprive the losing party of determination of the facts by the jury, they should be cautiously and sparingly granted . . .".

Plaintiff suggests in any event that the more appropriate approach is that taken by the lengthy dissent in *Barrett* written by Judge Alvin B. Rubin with whom Judges Reavley, Politz, Tate, Johnson, and Williams joined. As Judge Rubin points out:

> "The majority refused to determine an injured worker's status as a crew member on the basis of what he was doing when he was injured, but insists that his status must be decided on the basis of what he did in the past, and holds in effect that, unless the worker's 'permanent job assignment' has changed, his duties and status at the time he is injured are irrelevant. In doing so it makes a profound change in the rights of offshore maritime workers who are injured when assigned to a vessel and exposed to the perils of the sea, and who are in every real sense crew members. I, therefore, dissent from Part III of the majority opinion."

As noted by the dissent, the majority opinion carefully goes through the Supreme Court decisions in *Gianfala v. Texas Company*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed.2d 775 (1955); *Senko v. LaCross Dredging Corp., supra*; *Grimes v. Raymond Concrete Pile Company*, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958); and *Butler v. Whiteman*, 356

U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958), each of which held that the status question is for the jury and this is determined in light of the worker's assignment *when he is injured* and not by the general nature of his work. However, the Fifth Circuit then ruled in direct conflict with this Court's prior ruling. As stated by Judge Rubin at page 1077, "The majority's requirement that such a change reflect a 'permanent' change in job assignment is inflexible and contrary to the rationale underlying *Robison*." In any event, *this decision should be made by the trier of facts and not by summary judgment.*

3. The captain's conduct created liability under 33 U.S.C.A., Section 905(b).

On the other hand, if plaintiff's posture was that of a longshoreman, he still had a claim against the vessel under the Longshoremen & Harbor Workers' Compensation Act, 33 U.S.C.A., Section 905(b). The district judge denied recovery under this act on a finding that the captain of the vessel had no duty to intervene in the operations of the contracting company "until the hazard was discovered".

The crux of the judge's decision is based on this expressed lack of discovery of the hazard and on the following conclusions by the court:

> "The captain did discover that the gangway was not tied to the platform and did take steps to correct that situation by conferring with the IMM personnel who were responsible for its placement and its securing. He was assured by them that the job to be done would take no more than one hour and that the arrangement was safe for that period of time. He surveyed the situation and concurred

> in that conclusion. The accident happened several hours after the gangway was put in place, well beyond the time when the exercise was to have been completed and the gangway removed."

With all due respect to the lower courts, plaintiff urges, rather, that a fair reading of the testimony shows only that after the captain leveled the gangway to match the level of the platform and noticed that the riggers had not tied the gangway to the platform, he went down to the deck and told someone that the gangway was not tied. He was told that they would not be there very long, and since the gangway extended over the edge of the pipe on the structure, he decided it would probably be all right for about an hour and went on to his cabin to retire for the evening.

The landmark case fixing the shipowner's standard of care owed to the stevedore and his longshoremen (following the 1972 amendment to the Longshoremen's & Harbor Workers' Compensation Act) is *Scindia Steam Navigation Co., Ltd. v. De Los Santos, et al.*, 451 U.S. 156; 101 S.Ct. 1614; 68 L.Ed.2d 1 (1981). In *Scindia*, a longshoremen was injured while operating a defective ship's winch. The district court had granted a summary judgment of dismissal holding that the vessel owner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore is in exclusive control of the work, and that the shipowner had no duty to warn the stevedore or his employees of open and obvious defects. The appellate court reversed–holding that the vessel owner retained a duty to inspect, even after the vessel was turned over to the stevedore. The Supreme Court concluded that there were material facts in dispute and remanded the case. The Court relieved the vessel owner of any duty to inspect or supervise the operations of the stevedore's or independent contractor's employees absent custom, law, or contractual provision to the contrary. *Scindia*, 101 S.Ct. at 1624.

However, *Scindia* also held that a vessel owner has a duty to intervene with respect to obvious dangers that arise in areas outside his control and after the worker's operations have begun when the vessel owner has (1) actual knowledge that a dangerous condition exists, and (2) actual knowledge that the stevedore or independent contractor, or its employees, cannot be relied upon to remedy the condition, and that if unremedied, it will pose a substantial risk of injury, *Id.* at 1626-27.

Two recent cases regarding the vessel owner's duty for security of the gangway are *Sarauw v. Oceanic Navigation Corp.*, 655 F.2d 526 (3rd Cir. 1981) and *Davis v. Partenreederei M.S. Normannia*, 657 F.2d 1048 (9th Cir. 1981). In the *Sarauw* case, a longshoreman sued the vessel for damages for failing to properly secure the gangway. After carefully reviewing the recent *Scindia* decision, the appellate court, citing an earlier First Circuit case, upheld a finding of negligence as to the shipowner affirming its duty to exercise reasonable care with regard to the gangway, although the gangway in that case belonged to the stevedore company.

> "We are, accordingly, satisfied that Scindia does not require us to depart from our original conclusion, which we reaffirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use. *From this duty of care it could not divest itself even though the gangway was supplied by the stevedore, Hess, and at the time of the accident was being used by no one but the injured longshoreman.* Romero Reyes v. Marine Enterprises, Inc., 494 F.2d 866, 870 (1st Cir. 1974)." (p. 528)

In the *Davis* case, the plaintiff longshoreman was injured as a result of cargo being unloaded over the vessel's gangway. The ship's officer had observed the close proximity of the gangway to the landing point and appreciated the danger this posed to persons using the gangway. Although the highest ranking representatives of the stevedoring company had not noticed the danger, several longshoremen had, but failed to indicate this to their superior. The court considered the limitations imposed by *Scindia*, but upheld a finding of vessel negligence.

Also, the following comment concerning the vessel's responsibility is quite appropriate:

> "The shipowner, after all, is generally primarily responsible for repairing his own ship, its equipment or gear . . . Moreover, the owner likely stands in the best position to appreciate the danger caused by a defect in the ship itself, its gear or equipment." *Futo v. Lykes Bros. S.S. Co., Inc.*, 742 F.2d 209 (1984).

In the present case, there is no evidence of knowledge of the untied gangway by any of the higher ranking representatives of IMM. At best, one may *speculate* that it was one of the IMM hands on deck who heard the captain's comment about the gangway. Even then, as pointed out by the captian, he had specific instructions that any time he wanted to tell the IMM people something, or he wanted them to do something, he should not tell them directly. The Aries boss had told him, "Don't say nothing to them I. M. & M. hands if they do something wrong. Go to the company man, and if that doesn't do any good, call me." He admittedly ignored this instruction.

It is further submitted that an offhand comment by the captain to an unknown person did not constitue a warning to the stevedore or to Lormand as contempled by *Scindia*. From the evidence, the captain's comment may well have been directed to the very person who failed to tie the gangway. In any event, there was no indication that corrective action would be taken, so it served no purpose except to alert the captain that he should either direct that it be secured; go to a higher authority; or do something about getting his gangway secured so the longshoreman as well as the Superior hands on board would not be exposed to use of a gangway which he knew was unsafe.

Noteworthy is the fact that of everyone who testified, only the captain had observed that the gangway was not tied. Plaintiff suggests that this is because the placement and security of the ship's gangway is so inherently a part of the captain's domain that it is logical that he would observe such an insidious hazard. Plaintiff submits that the captain's acceptance of any assurances that the unsecured gangway would be safe for *any* period of time was unreasonable.

As stated by Judge Brown, in his concurring opinion of the instant case in the Fifth Circuit, "No Captain in his right mind could think allowing a gangway to be unsecured for an hour could satisfy the demanding standards of the general maritime law as far back as the Laws of Oleron, the Jones Act, or even *Scindia*'s treatment of Section 905. And under no circumstances would he be permitted to retire to much needed sleep confident that somehow, someone–not asleep–would become conscious that for the gangway to be safe as ingress or egress from the vessel, it would now have to be securely fastened. Whether characterized as seaworthiness or unseaworthiness, failure to establish would be such glaring fault that neither Section 905 or *Scindia*, not even F.R.Civ.P. 52(a) could ever rescue the vessel from the maritime inexorable decree of absolute liability."

John Lormand respectfully submits that the captain displayed an appalling lack of concern for the safety of the workers and passengers aboard his vessel. With a total awareness that workers would be traversing the gangway on a cold dark night, and moving to and fro with welding leads, tools and equipment, he simply turned his back on an unsecured gangway which he, and only he, fully realized was inexorably creeping to its fall. With admitted reliance on a mental calculation of the wind, the waves and the angle of the gangway which "only a computer could figure", he deemed the gangway secure for that illusory time period fixed by someone unknown. His testimony is a blunt statement of abject indifference by the captain of a ship. He gambled and Lormand lost.

SUMMARY

I.

The Court of Appeals for the Fifth Circuit has adopted a definition of the term "seaman" in a Jones Act context so as to include as to vessels in navigation those workers (1) who are permanently assigned to or do a substantial portion of their work aboard vessels, and (2) who contribute to the function of the vessel and the accomplishment of its mission, or its operation or welfare. *Offshore Co. v. Robison, supra*. The first requirement for seaman's status was recently narrowed by the Fifth Circuit so that the status determination must be based on the worker's entire period of employment with his current employer except when he has undergone a permanent change of job assignment. *Barrett v. Chevron, supra*.

The Court of Appeals for the Third and Seventh Circuits have adopted a definition of the term "seaman" requiring that for the plaintiff to obtain such status under the Jones

Act his employment must relate to the *transportation* function and mission of the vessel, with no corrolary requirement that the past history of employment by the current employer be explored. *Johnson v. John F. Beasley Construction Co., supra*; *Simko v. C & C Marine Maintenance Co., supra.*

Lormand was caught in the middle–between *Robison, Barrett,* and *Johnson.* He took up quarters aboard the RAM V, did his work on board, and literally never set foot ashore until he returned to port with the ship. He has straddled these various circuit court decisions with no firm basis for fixing his status.

The term "seaman", as used in the Jones Act, should be defined by the Supreme Court.

II.

The Jones Act is remedial legislation which is to be given a benevolent interpretation. *Cosmopolitan Shipping Co. v. McAlister, supra* Summary judgments deprive the losing party of determination of the facts by a jury and should be cautiously and sparingly granted. *Abshire v. Seacoast Products, Inc., supra.* The question of seaman status under the Jones Act, except in the most exceptional of circumstances, should be left to the jury. *Gianfala v. Texas Co., supra*; *Senko v. LaCross Dredging Corp., supra.*

The status determination in Lormand's case was made essentially on criteria called for in *Barrett* before *Barrett* was decided. These criteria ignore the liberal tone of the Jones Act contrary to the mandate of the Supreme Court. To compound the wrong, Lormand never got an opportunity, as even Barrett did, for a full evidentiary hearing.

III.

Even if he could not qualify as a seaman, the conduct of the captain in this case was so egregious that liability of the vessel for the loss of the gangway and consequent injury to the plaintiff would lie under any theory of law. To allow the captain to abdicate responsibility for a known, possibly lethal, condition of his vessel under these circumstances runs afoul this Court's pronouncements in *Scindia Steam Nav. Co., Ltd. v. De Los Santos, supra*, and stands as mockery to the avowed stringent rules of vessel liability.

CONCLUSION

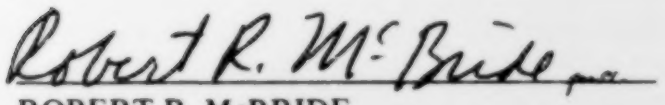
I.

Hearing should be granted for resolution of the differences between the circuit courts on the question of seaman status under the Jones Act.

II.

With or without hearing, the judgment of the Court of Appeals for the Fifth Circuit should be reversed with mandate that the case be tried to a jury; or, alternatively, that the decision be reversed on the issue of vessel negligence under the Longshoremen's and Harbor Workers' Compensation Act, Section 905(b).

Respectfully submitted,



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APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4278

JOHN LORMAND,
Plaintiff-Appellant,
Cross-Appellee,

versus

THE SUPERIOR OIL COMPANY,
Defendant-Appellee,
Cross-Appellee,

AND

ARIES MARINE CORPORATION,
Defendant-Appellee,
Cross-Appellee,
Cross-Claimant-Appellant,

versus

INTERNATIONAL MOORING & MARINE, ET AL.,
Defendants-Appellees,
Cross-Appellants, and
Defendants in Cross-Claim-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana
(CA-83-1851-L)

(June 5, 1987)

Before BROWN, RUBIN, and GARWOOD, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant John Lormand (Lormand), injured his back while working as a welder on jack-up vessel RAM-V, which was located in the Gulf of Mexico off the coast of Louisiana. His injuries allegedly occurred when the vessel's gangway, on which he stood, fell. Based on its determination that Lormand was not a seaman and, therefore, was ineligible to recover under the Jones Act. 46 U.S.C. § 688, the district court granted summary judgment in favor of Lormand's employer, International Mooring & Marine, Inc. (IMM), dismissing IMM as a defendant. Following a bench trial on the remaining issues, the district court held that neither the vessel owner, Aries Marine Corporation (Aries), nor the platform owner, Superior Oil Compnay (Superior), was liable for Lormand's injury. In his appeal to this Court, Lormand asserts that he raised a genuine issue of material fact regarding his status as a seaman under the Jones Act and, therefore, that the district court erred in granting summary judgment for IMM. Lormand also contends that the captain of the vessel negligently caused his injury by failing to ensure that the gangway was secured and that, therefore, the district court erred in dismissing his claim against Aries under section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b). We hold that the district court was correct in determining that, as a matter of law, Lormand was not a seaman, and that its finding of no negli-

* Local Rule 47.5 provides: "the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

gence on the part of Aries was not clearly erroneous.[1] Accordingly, we affirm the district court's dismissal of Lormand's claims for relief.

Facts and Proceedings Below

IMM hired Lormand in January 1980 to work as a welder in its Construction Division. From the date he was hired until he was injured in November 1982, Lormand worked a total of 419 days. He spent approximately sixty-five days, or fourteen percent, of his time doing welding work in the repair of offshore structures, which involved use of a jack-up vessel. Additionally, he worked twenty-nine days repairing a drilling barge moored at an IMM dock in Louisiana and six days repairing a barge located in the Gulf of Mexico. The remainder of Lormand's work for IMM was land-based.

Pursuant to a master service contract with Superior, for the nine months preceding Lormand's injury IMM had been providing welding and construction services on various stationary drilling platforms owned by Superior and located in the Gulf of Mexico. To assist IMM in performing these services, Superior had also contracted with Aries for use of the RAM-V, one of the jack-up vessels owned by Aries. The RAM-V provided transportation for IMM welders and riggers to various Superior platforms, as well as living quarters, meals, and an alternate work space.

1. Lormand's "Statement of Issues" in his appellant's brief includes an issue relating to the liability of Superior. However, as Superior points out in its appellee's brief, nowhere in appellant's brief is there one word of argument, or citation of authority, concerning this issue. It is simply not briefed. Moreover, appellant's reply brief totally ignores the issue. In these circumstances, we regard the issue as waived. *See e.g., Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985).

On November 14, 1982, IMM assigned Lormand to a work crew already aboard the RAM-V. The IMM crew was in the process of constructing an extension to be welded onto one of Superior's fixed platforms. Since the platform was small, the welders prefabricated the extension structure aboard the RAM-V and made only tie-in welds from the platform itself. In the evening of November 16, 1982, prefabrication had been completed and the RAM-V was elevated from its fixed position at the Superior platform to a level ten feet above the surface. Once the RAM-V was fixed into position, its gangway was lifted by crane and placed between the RAM-V and the platform. IMM riggers then physically detached the gangway from the crane and placed it down.

From the vessel's wheelhouse, the RAM-V captain, who was an Aries employee, observed the placement of the gangway. Noticing that no one tied the gangway to the platform, he descended and informed someone on deck that it had not been tied. He was told that because the IMM crew would be welding for less than an hour, it did not need to be tied. The captain concurred that the untied gangway would not present a hazard for this limited amount of time and retired to his cabin for the evening.

Soon after this conversation, the IMM welding crew began attaching the prefabricated extension to the platform. Lormand assumed a work position that required him to stand on the gangway. After he had been welding for roughly two hours, the gangway separated from the platform, causing Lormand to fall ten to fifteen feet into the water. From this fall Lormand allegedly sustained the injuries for which he sued.

Lormand filed suit in the Western District of Louisiana, claiming damages under the Jones Act, general maritime law, and Louisiana law, for negligence and unseaworthiness.

Lormand sued his employer, IMM; the owner of the RAM-V, Aries; and the platform owner, Superior. The district court granted summary judgment in favor of IMM on the issue of Lormand's status as a seaman under the Jones Act, and dismissed IMM as a defendant. Following a bench trial on the remaining issues, the district court found that there was no evidence of negligence by Superior; that Lormand's claims against Aries were limited to those provided by section 905(b) of the LHWCA, 33 U.S.C. § 905(b) (1982)[2]; and that Aries violated no duty owed to Lormand under section 905(b). The district court therefore rendered judgment in favor of Superior and Aries, dismissing Lormand's claims. Lormand brings this appeal.

Discussion

Seaman Status

The test for seaman status under the Jones Act is well established in this Circuit. Sitting en banc in *Barrett v. Chevron, U.S.A.*, 781 F.2d 1067 (5th Cir. 1986), we recently reaffirmed the two-part test set forth in *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959). A worker claiming seaman status must establish (1) that he is assigned permanently to a vessel in navigation or performs a substantial part of his work on a vessel or fleet of vessels[3] and (2) that his work contributes to the function of the vessel or to the accomplishment of its mission. *Barrett*, 781 F.2d at 1072-74; *see also Smith v. Odom Offshore Surveys, Inc.*, 791 F.2d 411, 415 (5th Cir. 1986). The question of seaman status under the Jones Act is usually a question of fact for the jury; however, where there is no reasonable evidentiary basis to support a jury finding that the injured worker is a seaman, summary judgment denying seaman status is proper. *Garret v. Dean Shank Drilling Co.*, 799 F.2d 1007 (5th Cir. 1986); *Reynolds v. Ingalls Shipbuilding Division*, 788 F.2d 264, 267 (5th Cir.), *cert. denied*, 107 S.Ct. 278 (1986); *Barrett*, 781 F.2d at 1074.

2. In the 1972 amendments to the LHWCA, Congress abolished the longshoreman's right to recover for unseaworthiness. Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1263 (current version at 33 U.S.C. § 905(b) (1982)). Moreover, section 905(b) of the LHWCA makes its remedy "exclusive of all other remedies against the vessel." The LHWCA defines "vessel" to include the owner of the vessel. *See* 33 U.S.C. § 902(22). Hence, the district court properly limited Lormand's claim aginst Aries to the negligence claim provided for by section 905(b).

Since the first prong of this test is disjunctive, a worker may qualify as a seaman, even though he has not been permanently assigned to the crew of the vessel, if he does substantial work on the vessel. *See Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1239 (5th Cir. 1986) (quoting *Barrett*, 781 F.2d at 1073), *cert. denied*, 107 S.Ct. 939 (1987). In *Barrett*, we considered the duration and nature of the employee's assignment necessary to submit to the jury the question whether he performed a substantial portion of his duties aboard a vessel. We stated that where "the employee's regularly assigned duties require him to divide his time between vessel and land (or platform)," his

3. We explained in *Barrett* that "[b]y fleet, we mean an identifiable group of vessels acting together or under one control." 781 F.2d at 1074. We rejected there "the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated." *Id.*; *accord Waguespack v. Aetna Life & Casualty Co.*, 795 F.2d 523, 526 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1309 (1987).

status is to be "determined 'in the context of his entire employment' with his current employer." *Barrett*, 781 F.2d at 1075 (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980)). As we noted, this rule applies unless the employee's permanent job assignment has changed during the course of employment by his present employer. *Id.* Only is this latter situation is the employee entitled to have the substantiality of his vessel-related work assessed on the basis of a time period other than his entire term of employment by that employer.

Applying these principles to *Barrett's* facts, we held that as a matter of law, Barrett was not a seaman. 781 F.2d at 1076. Barrett's employer had contracted with Chevron, U.S.A. to provide welding crews for maintenance and repair work to offshore platforms in Chevron's Bay Marchand Field in the Gulf of Mexico off the Louisiana coast. *Id.* at 1068. When injured, Barrett, a welder's helper, had been working for his employer for approximately a year. Over the course of his employment, Barrett had been assigned to different Chevron platforms and ordinarily worked on a particular platform until repairs on it were completed. At the time of his injury, Barrett had been assigned to a work crew responsible for repairing a very small offshore structure owned by Chevron. *Id.* at 1069. Because the structure was so small, Barrett's employer provided the crew with a jack-up barge for eating, sleeping, and work space. Although Barrett had spent seventy to eighty percent of his time on this assignment prefabricating new pipe aboard the jack-up barge, during the entire term of his employment he had worked aboard vessels only twenty to thirty percent of the time. *Id.* at 1076. We determined that since Barrett's employment duties as a welder's helper in Chevron's Bay Marchand Field did not significantly change during the term of his employment, assessment of his vessel-related duties for a period shorter than his entire employment was unwarranted. We

concluded that based on the entirety of his employment, Barrett had not performed a substantial part of his work on vessels and, therefore, that he was not a seaman within the meaning of the Jones Act. *Id.*

Similarly, in this case, the district court found that Lormand was neither permanently assigned to, nor performed a substantial part of his work aboard, a vessel or fleet of vessels.[4] Lormand contests these findings. Although he concedes that summary judgment denying him seaman status may be proper if the entire term of his employment by IMM is considered, Lormand argues that he was permanently assigned to the RAM-V and, therefore, was entitled to have the substantiality of his vessel-related work assessed only for the duration of that assignment. He argues further that since he was assigned, on November 14, 1982, to join the crew on the RAM-V until the job was completed, this was an assignment of indefinite duration and, consequently, a new permanent assignment.[5]

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4. As we explained in *Barrett*, since several Supreme Court cases, *see Butler v. Whiteman*, 78 S.Ct. 734 (1958); *Grimes v. Raymond Concrete Pipe Co.*, 78 S.Ct. 687 (1958); *Gianfala v. Texas Co.*, 76 S.Ct. 141 (1955), dictate that "aid in navigation" must be broadly interpreted, the second prong of the *Robison* test is easily satisfied. *See Barrett*, 781 F.2d at 1073. No one has disputed on appeal that Lormand satisfied the second prong of *Robison*.

5. In his appeal to this Court, Lormand argues that because IMM assigned him to join the work crew aboard the RAM-V for an indefinite period of time and because, unlike his prior assignments, this one required him to fabricate pipes aboard ship instead of on the platform, his assignment to the RAM-V was a new, permanent assignment. *Cf. Barrett*, 781 F.2d at 1075-76. An affidavit submitted by IMM in support of its summary judgment motion, however, stated htat the job was completed on November 18, only two days after Lormand's injury. Additionally, Lormand stated in his deposition that he remained with the IMM crew until the work was completed on November 18. Thus,

The close parallel between the *Barrett* facts and Lormand's situation leads us to reject Lormand's argument. Like Barrett, Lormand did welding work pursuant to his employer's contract for maintenance and repair services on fixed platforms owned by an oil company (here, Superior). Over the course of their employment, both Lormand and Barrett had been assigned to work on several different platforms. Lormand's latest assignment involved substantial work aboard a vessel, as did Barrett's, but Lormand's job duties as a welder remained essentially unchanged.[6] Hence, like Barrett, Lormand was not entitled to have the substantiality of his work aboard vessels assessed only for the duration of his latest specific work assignment.

5. (Continued)

the uncontroverted evidence presented at the time of the summary judgment motion was that Lormand was assigned to a job that IMM expected to last four to five days, and which in fact lasted only four days. Hence, the evidence indicates that Lormand's assignment was for a relatively definite period of short duration. Even if Lormand's assignment to the RAM-V had been for an indefinite period, an indefinite assignment does not automatically make it "more or less" permanent; rather, it is only a factor to be considered in making that determination. *See Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 534 (5th Cir. 1986).

6. Although *Barrett* allows for assessment of "substantial work" over a period shorter than entire employment when an employee receives a new assignment that permanently changes his "essential duties," Lormand's duties changed no more than Barrett's did. Unlike the situation in some of their previous assignments, on the assignment during which they were injured both Barrett and Lormand had to fabricate pipes on the jack-up vessel. *Barrett*, 781 F.2d at 1076. However, like Barrett's, Lormand's job duties continued to require him to perform welding and welding-related tasks and, thus, remained essentially unchanged.

Considered, as it must be, in the context of the entire thirty-four-month period of his employment by IMM, Lormand performed only fourteen percent of his work activity aboard vessels. Since Lormand spent proportionally even less time working on a vessel than did Barrett, our decision in *Barrett* compels us to agree with the district court that Lormand presented insufficient evidence to support submission of the question of his status as a seaman to the jury. We therefore affirm the district court's summary judgment against Lormand on the seaman status issue.

Vessel Owner Negligence

Recovery for injury to a person, other than a Jones Act seaman, working on the outer continental shelf is governed by the LHWCA, 33 U.S.C. §§ 901-950 (1982). Section 905(b) of the LHWCA permits a worker to recover from a vessel owner for personal injury "caused by the negligence of [the] vessel." 33 U.S.C. § 905(b) (Supp. II 1984). For such negligence to have occurred, however, the vessel owner must have violated a duty owed to the injured worker.

In the context of liability under the LHWCA by a vessel owner for injury to a stevedore's employee working aboard the vessel, the Supreme Court has articulated several principles that govern the scope of the vessel owner's duty. *See Scindia Steam Navigation Co. v. De Los Santos*, 101 S.Ct. 1614 (1981). Although *Scindia* discussed the respective duties of a vessel owner and stevedore, our subsequent jurisprudence has made it clear that the rationale of *Scindia* applies equally to questions of vessel owner liability for injuries to LHWCA-covered employees of an independent contractor working aboard the vessel. *See Hill v. Texaco, Inc.*, 674 F.2d 447, 451 (5th Cir. 1982). Thus, the distribution of duty between a vessel owner and stevedore outlined in *Scindia* also governs the scope of Aries' duty, as owner

of the RAM-V, to Lormand, as a LHWCA-covered employee of an independent contractor, IMM, who was injured while working aboard a barge.

The Court in *Scindia* explained that at the outset, prior to commencement of the worker's operations, the shipowner has a duty to exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety." 101 S.Ct. at 1622. The shipowner also has a duty at the outset to warn the stevedore or independent contractor of hidden dangers. *Id.*; *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986). Once the employees of the stevedore or independent contractor begin working however, the vessel owner has no general duty to discover dangerous conditions that develop within the confines of their operations. *Scindia*, 101 S.Ct. at 1624; *Futo v. Lykes Bros. Steamship Co.*, 742 F.2d 209, 213 (5th Cir. 1984). The Court specifically relieved the vessel owner of any duty, absent custom, law, or contractual provision to the contrary, to inspect or supervise the operations of the stevedore's or independent contractor's employees. *Scindia*, 101 S.Ct. at 1624

Scindia also created an exception to these principles, however, finding that where two conditions are present, a vessel owner retains a duty to intervene with respect to obvious dangers that arise in areas outside his control and after the workers' operations have begun. This duty attaches only when the vessel owner has (1) actual knowledge that a dangerous condition exists and (2) actual knowledge that the stevedore or independent contractor, or its employees, cannot be relied upon to remedy the condition, and that if unremedied it will pose a substantial risk of injury. *Id.* at

1626-27; *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128, 131 (5th Cir. 1986).[7]

The issue in this case is whether the captain of the RAM-V, and hence Aries, negligently failed to ensure that the vessel's gangway was tied. The district court found that

> "[i]t was the established practice and procedure that when the M/V RAM V was brought into position alongside a platform the IMM crew, using the barge's crane, would set the barge's gangway in place between the barge and the platform and the first IMM rigger to cross the gangway would tie off the end of the gangway on the platform to the platform. All persons on hand were aware of this practice and procedure."

Thus, the district court reasoned that Aries had no general duty under *Scindia* to discover and correct dangerous conditions that might have developed due to the untied gangway; instead, Aries' duty was limited to the exception expressed in *Scindia* for dangers that develop after the workers' operations have begun and in areas not under the vessel owner's control.

Lormand does not contest these findings. He does contend, however, that Aries violated its limited duty to him

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7. We have repeatedly applied these standards in this Circuit. *See Theriot*, 783 F.2d 527 at 535; *Futo*, 742 F.2d at 216; *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 298-99 (5th Cir. 1984); *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir. 1983); *Helaire v. Mobile Oil Co.*, 709 F.2d 1031, 1036 (5th Cir. 1983); *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1247 (5th Cir. 1982); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 115 (5th Cir. 1981).

under the *Scindia* exception. He argues that since the captian knew that the IMM riggers had not tied the gangway and that they intended not to tie it, the two actual knowledge prerequisites of *Scindia* were met and, therefore, that Aries violated its duty to intervene to protect IMM's employees.

The district court found to the contrary, however, that the RAM-V captain lacked the requisite knowledge that a hazard was present and, consequently, that he was not negligent in failing to intervene.[8] While we might have evaluated the evidence differently, we cannot say that the district court's findings are clearly erroneous.[9] On this record, the district court could properly conclude that the dangerous condition at issue was not simply that the gangway was not initially tied, but that it remained untied long enough to present a hazard of falling while an IMM employee was working on it. The relevant hazard was not using the gangway as a ship's gangway, but its subsequent use, untied, by IMM as a special work station for its employees. *Cf. Futo*, 742 F.2d at 219-20

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8. The district court found that

> "[t]he captain of the M/V RAM V noticed from the wheelhouse that the gangway was not tied, went on deck and spoke to IMM personnel concerning the fact that it was not tied. He was told by the personnel of IMM with whom he spoke that it had not been tied in place because the job would not take more than an hour and it was the IMM employee's opinion that enough of the gangway extended onto the platform that it would be safe without tying for that period. The captain then surveyed the situation and agreed that, for the period of an hour, the gangway was safe without being tied. He then retired to his cabin to sleep and the IMM personnel continued their work."

9. Since the question of negligence in maritime cases is a

(holding that dangerous condition was not just that scaffold lacked guardrail at some point during stevedoring operations, but it had no guardrail while employees were using it as a work platform). Although the captain knew that no one tied the gangway when it was placed down, he was told that because the welding work would be completed in less than an hour, the gangway would be safe for the period the workers would be walking across it.[10] Under these circumstances, we cannot say that the district court was clearly erroneous in not finding that the captain was negligent in failing to initially require that the gangway be tied.

Even assuming, as Lormand argues, that the captain of the RAM-V must have known that over an hour had passed and yet the welding work continued, nothing in the record suggests that he knew the gangway had not been tied in the interim. Only if the captain had such knowledge could Aries have violated its duty to Lormand. *Scindia* imposes no duty on a vessel owner to monitor an independent contractor's operations for development of hazardous conditions. The

---

10. The evidence shows that the captain retired to his cabin once the work began; hence, it provides some support for a finding that he did not know that IMM workers remained on the platform for longer than an hour. Since several witnesses testified that Lormand fell more than two hours after the gangway was placed, the evidence also supports the district court's finding that the gangway fell more than an hour after its placement.

Lormand makes much of the fact that Aries failed to establish at trial that it was an IMM employee who told the captain that the work would last less than an hour and that the untied gangway would be safe for that long. The evidence in the record shows, however, that besides the captain, Aries had only a cook and a deckhand aboard the RAM-V. Other than IMM personnel, no one else was aboard. The evidence indicates that neither of these Aries crew members were on deck when the captain was told that IMM welders would be finished in less than an hour.

evidence supports a finding that the captain lacked knowledge that the gangway had not been tied even after an hour passed and that he had no reason to know a welder would be working on the gangway over two hours later, even if he knew an hour had passed. Accordingly, the record does not compel the conclusion that the captain knew IMM workers were likely using the gangway, without having tied it, at a time when there was a danger it would fall.

Moreover, there is no evidence that the RAM-V captain knew IMM welders were going to use the gangway as a welding platform, which is how Lormand was using it when it fell. Even if, as Lormand argues, the captain must have known that the platform work continued for longer than the hour during which the untied gangway did not present a hazard, the record does not compel the conclusion, asserted by Lormand, that the captian knew an IMM employee was likely working on the gangway then. If the gangway had been used, as it normally was, only as a passageway between the vessel and the platform, then even if work on the platform continued for several hours, as long as the gangway was tied before the workers used it to return to the vessel, the untied gangway would present no hazard in the interim. Thus, even assuming the captain knew that more than an hour had passed, the record does not necessitate the conclusion that he knew a dangerous condition had developed. Further, Lormand had the burden of proof and of persuasion on these issues. We cannot say that the district court was required to find that Aries had the requisite knowledge under *Scindia* for imposition of liability against it as owner of the RAM-V.

Accordingly, we determine that the district court's finding of no negligence was not clearly erroneous and affirm its holding dismissing Lormand's section 905(b) claim against Aries.

Conclusion

Lormand did not perform a substantial portion of his work for IMM aboard a vessel or fleet of vessels; therefore, he was not a seaman within the meaning of the Jones Act. Additionally, the district court's factual finding of no section 905(b) negligence on the part of Aries is not clearly erroneous. The judgment of the district court is therefore

AFFIRMED.

BROWN, Circuit Judge, concurring:

I Concur. I concur fully in the Court's opinion denying *Robinson-Barrett* seaman's status. With less enthusiasm, I concur in denial of § 905(b) relief from Aries, the vessel owner. I concur solely because the gangway was not being used–or intended by IMM to be used–as a gangway. Rather it was used–and intended to be used–as a work platform by welders. No Captain in his right mind could think allowing a gangway to be unsecured for an hour could satisfy the demanding standards of the general maritime law as far back as the Laws of Oleron, the Jones Act, or even *Scindia's* treatment of § 905. And under no circumstances would he be permitted to retire to much needed sleep confident that somehow, someone–not asleep–would become conscious that for the gangway to be safe as ingress or egress from the vessel, it would now have to be securely fastened. Whether characterized as seaworthiness or unseaworthiness, failure to establish this would be such glaring fault that neither § 905 or *Scindia*, not even F.R.Civ.P. 52(a) could ever rescue the vessel from the maritime inexorable decree of absolute liability.

RUBIN, J., Concurring:

While I continue to hold the views stated in my dissent from the majority opinion in Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1985) (en banc), the test applied in that opinion is now the law of the circuit, and I, therefore, concur.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1851 "L"

JOHN LORMAND

VS.

THE SUPERIOR OIL COMPANY,
ARIES MARINE CORPORATION
AND INTERNATIONAL MOORINGS & MARINE, INC.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
SEP 18 1984
ROBERT H. SHEMWELL CLERK
BY s/s J P
Deputy
(stamp)

MEMORANDUM RULING
ON MOTION FOR SUMMARY JUDGMENT

International Moorings & Marine, Inc., plaintiff's employer, has moved this Court for summary judgment challenging the alleged seaman status of plaintiff. It contends that plaintiff was not permanently assigned to a vessel or fleet of vessels but that his connection was merely incidental to the work which was being performed on the adjacent platform.

The undisputed facts are that plaintiff was employed by International Moorings & Marine, Inc., as a welder in the construction division of that company. He worked from January of 1980 to November 1982, a total of 419 days. During that period, he spent 65 days doing welding work in the repair of offshore structures which involved the use of a jackup barge. This is the type of work he was doing at the time he was injured. The plaintiff ate and slept on the barge. His welding equipment was on the barge. He fabricated portions of the work which was ultimately installed on the platform while he was on the barge. Additionally, he spent 29 days working on an Odeco drill barge doing repairs while that drill barge was moored at the International Moorings & Marine dock at the Port of Iberia. Plaintiff spent 6 days doing repair work on a barge belonging to Heererma Engineering Company in the Gulf of Mexico in 1980. Other than the foregoing all of plaintiff's work was land based.

At the time of the accident in question, he was working as a welder doing repair work to a stationary platform.

The tests to be applied in making the determination called for here are very clearly set forth by the Fifth Circuit in *Bertrand v. International Moorings & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983) and will not be repeated in detail. As stated therein the claimant's status must be addressed with reference to the nature and location of his occupation as a whole. The relationship to a vessel must be substantial in point of time and not merely sporadic or transitory. To satisfy the "substantial work" part of the *Robinson* test, plaintiff must do a significant part of his work on a vessel with some degree of regularity and continuity. To satisfy "permanency" requirement, he must have more than a transitory connection with a vessel or vessels. The nature of his work must also be considered. Applying those tests to the foregoing facts, it is this Court's opinion that reasonable

people could not draw conflicting inferences from the facts and that plaintiff is clearly not a seaman. He was not permanently assigned to a vessel or vessels nor did he perform a substantial part of his work on a vessel or vessels. His presence aboard the jackup barge in this case was transitory and sporadic.

Accordingly, the motion for summary judgment filed by International Moorings & Marine, Inc., will be granted. Counsel for International Moorings & Marine is instructed to prepare and submit an appropriate judgment forthwith.

Lafayette, Louisiana, September 12, 1984.

s/s John M. Duhe, Jr.
JUDGE, U. S. DISTRICT COURT

COPY SENT
DATE: 9-18-84
BY: s/s J P
TO: **Buergler**
McBride
Severance
Bivins
Provosty
Spencer
(stamp)
(names penned in)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1851 "L"

JOHN LORMAND

VS.

THE SUPERIOR OIL COMPANY,
ARIES MARINE CORPORATION, AND
INTERNATIONAL MOORINGS AND MARINE, INC.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
MAR - 7 1985
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FINDINGS OF FACT

On or about November 16, 1982, repair work was being conducted on Superior Oil Company's production platform West Cameron 72-1 off the coast of Cameron, Louisiana, on the Outer Continental Shelf in the Gulf of Mexico. Welding work was being performed by International Mooring & Marine pursuant to a master-service contract between it and

Superior Oil Company covering repair and maintenance work on numerous of Superior's platforms off the coast of Louisiana. Aries Marine Corporation owned the jack-up barge M/V RAM V and had agreed with Superior to provide the vessel and crew to assist the IMM welders in performing their work at various platforms and to provide living quarters and work space for the IMM crew and others necessary to the operation. Supervision of the work being conducted on behalf of Superior Oil Company was done by Offshore Specialists, Inc., through its employee Harold Lamey. No Superior hands were present.

It was the established practice and procedure that when the M/V RAM V was brought into position alongside a platform the IMM crew, using the barge's crane, would set the barges gangway in place between the barge and the platform and the first IMM rigger to cross the gangway would tie off the end of the gangway on the platform to the platform. All persons on hand were aware of this practice and procedure.

On November 16, 1982, the M/V RAM V was alongside Superior's West Cameron 72-1 platform and somewhere between 7:00 and 9:00 PM the vessel was jacked down to the "Plus 10" position alongside the platform and the IMM rigger and crane operator placed the gangway into position between the vessel and the platform using the vessel's crane. While this was being accomplished no member of the RAM V crew was on deck or participated in the operation. Once the gangway was positioned, the lead fitter-welder for IMM crossed the gangway and began taking measurements on the platform but, contrary to the customary practice, failed to tie off the gangway to the platform. Thereafter welders and riggers began to cross freely from the vessel to the platform going about their duties.

The captain of the M/V RAM V noticed from the wheel house that the gangway was not tied, went on deck and spoke to IMM personnel concerning the fact that it was not tied. He was told by the personnel of IMM with whom he spoke that it had not been tied in place because the job would not take more than an hour and it was the IMM employee's opinion that enough of the gangway extended onto the platform that it would be safe without tying for that period. The captain then surveyed the situation and agreed that, for the period of an hour, the gangway was safe without being tied. He then retired to his cabin to sleep and the IMM personnel continued their work.

Several hours later plaintiff, an IMM welder, was standing on the gangway at the platform welding. The gangway came away from the platform and fell into the water carrying plaintiff with it.

Plaintiff, before beginning his work, took notice of the fact that the gangway extended four or five feet onto the platform and, having seen this, made no effort to determine whether or not it was in fact tied off because he considered an extention of the length to be safe.

There were no crew members present on deck following the captain's survey of the gangway position until after the accident occurred.

The contract between Superior and IMM provides:

> "Contractor (IMM) agrees to indemnify, defend, and hold harmless Superior, . . . from and against . . . all claims, demands, or suits for damages to persons . . . which may be brought against Superior . . . ." (Superior Exhibit No. 6.)

Additionally, the contract provides that IMM will obtain insurance covering the risks assumed under the contract which policy is required to name Superior as an additional insured. Pursuant thereto Superior is named as an additional insured in a policy (Superior Exhibit No. 1) issued by Fidelity and Casualty Company of New York insuring IMM against liability because of bodily injury or death to its employees injured in the course of their employment.

Customarily Aries Marine supplied vessels to Superior pursuant to the terms and conditions of a work order. The work order of the particular job and vessel in question was not introduced but the evidence establishes that Superior Exhibit No. 5, which is a copy of a work order dated subsequent to the accident, is the form customarily used between the parties (joint Aries-Superior Exhibit No. 1). That contract form provides:

> "INDEMNIFICATION: Contractor (Aries) shall defend, indemnify, and save harmless company (Superior), . . . from and against any and all loss, damage, injury, liability, cost, including attorney's fees and claims thereof, for injury to or death or a person . . . resulting directly or indirectly from contractors performance of this work order . . . ."

The work order further provided that IMM would insure its obligation. Pursuant thereto the policy issued by Glacier General Assurance Company to IMM (a P & I policy) named Superior as an additional insured and specifically extended coverage to liability assumed by Aries under contracts. It obligates the insurer to pay such sums as the insured (Aries and Superior) shall become liable to pay as owner of the vessel RAM V. The policy further contains the standard provisions for defending the named insureds thereunder and paying the cost of defense.

CONCLUSIONS OF LAW

There is absolutely no evidence in this case of negligence on the part of Superior Oil Company as owner of the platform. The record is clear that it had absolutely nothing to do with the setting of the gangway in place or the failure to secure it properly. There is, therefore, no predicate in law for Superior's liability as owner of the platform.

Plaintiff's claims are then restricted to those available to him against the vessel owners under § 905 (b) of the Longshoreman and Harbor Workers Compensation Act, inasmuch as this Court has previously determined by motion for summary judgment that plaintiff did not enjoy the benefits of seaman status.

This litigation is then governed by the principles established by the United States Supreme Court in *Scindia Steam Navigation Company Ltd. v. De Los Santos*, 450 1 U.S. 156, 101 Supreme Court 1614, 68 L.Ed. 2nd 1, (1981), and the opinions of the Fifth Circuit Court of Appeal subsequent thereto, most recently, *Futo v. Lykes Brothers Steamship Company, Inc.*, 83-3449 (September 24, 1984).

Primary responsibility for the safety of the longshoreman rests upon the stevedore. The ship owner may generally rely upon the stevedore to avoid exposing the longshoreman to unreasonable hazards. The ship owner has no general duty to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.

However, the ship owner does have a duty to intervene to protect the longshoreman when the ship owner knows of a danger on the ship and that the stevedore is not taking steps to protect the longshoreman from the danger.

Under the above stated rules, the ship owner had no duty to act in the case at bar until the hazard was discovered. The captian did discover that the gangway was not tied to the platform and did take steps to correct that situation by conferring with the IMM personnel who were responsible for its placement and its securing. He was assured by them that the job to be done would take no more than one hour and that the arrangement was safe for that period of time. He surveyed the situation and concurred in that conclusion. The accident happened several hours after the gangway was put in place, well beyond the time when the exercise was to have been completed and the gangway removed.

These facts in themselves vindicate the captain's judgment. The gangway was indeed secure for more than an hour.

Having carefully compared the facts of this case with those of the cases cited above, and the actions of the respective parties to this proceeding having been measured in light of the standards set forth in the cases cited above, I can find no failure on the part of the owner and/or charterer of the vessel to perform any duty owed by them.

Accordingly, judgment will be rendered dismissing plaintiff's demand against them at plaintiff's costs.

The contracts between Superior and IMM and Superior and Aries Marine both clearly provide for indemnity and both require that the contractual obligations be insured. The claim against IMM and Superior under the Jones Act was dismissed earlier in the proceedings. The evidence in the present case produced a contract only of the type that was normally used. There is nothing in the contract or in the other documents introduced into evidence that specifically establishes a written contract between Superior and Aries providing for indemnity. There being no positive proof

of a written contract providing for indemnification, there can be no indemnification. The policy issued by Glacier covers only indemnity agreements assumed by contract. There having been no contract proven, there would appear to be no coverage.

Accordingly, Superior's claims for indemnity will be dismissed.

Counsel for Aries Marine shall prepare a formal judgment in accordance with these reasons and forthwith submit the same to opposing counsel and to the Court for signature.

Lafayette, Louisiana, March 7, 1985.

s/s John M. Duhe, Jr.
JUDGE, U. S. DISTRICT COURT

COPY SENT
DATE 3-7-85
BY J P
TO McBride
Gachassin
Buergler
Carugee
Bevins
Spencer
(stamp)
(names penned in)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1851 SECTION "L"

JOHN LORMAND,

VERSUS

THE SUPERIOR OIL COMPANY,
ARIES MARINE CORPORATION, AND
INTERNATIONAL MOORINGS & MARINE, INC.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
OCT - 1 1984
ROBERT H. SHEMWELL, CLERK
BY J P
DEPUTY
(stamp)

JUDGMENT

The Court having determined that the Motion for Summary Judgment by Defendant INTERNATIONAL MOORINGS & MARINE, INC. with respect to the claim of JOHN LORMAND should be granted, as set forth in the Memorandum of the Court of September 12, 1984,

Judgment is hereby rendered dismissing the Complaint of JOHN LORMAND against INTERNATIONAL MOORINGS & MARINE, INC., reserving unto Complainant JOHN LORMAND claims asserted herein by him against other Defendants.

LAFAYETTE, LOUISIANA, this 1st day of Oct 1984.

s/s John M Duhe, Jr.
UNITED STATES DISTRICT JUDGE

Judgment Entered 10-2-84
By s/s L J Sprott
Copy To McBride Provosty
Severance Bevins
Spencer Buergler
(stamp)
(names penned in)

COPY SENT
DATE: 10-1-84
BY: s/s J P
TO: McBride
Severance
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-1851 SECTION "L"

JOHN LORMAND

VERSUS

THE SUPERIOR OIL CO., ET AL

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
F I L E D
MAR 25 1985
ROBERT H. SHEMWELL, CLERK
BY s/s L P
DEPUTY
(stamp)

JUDGMENT

This action came on for trial before the Court, the Honorable John M. Duhe, Jr., District Judge presiding. The issues having been duly tried, decision having been duly rendered and the Court having made findings of fact and conclusions of law; it is

ORDERED, ADJUDGED AND DECREED, pursuant to the provisions of the Federal Rules of Civil Procedure, Rules 55 and 58, that there be judgment herein in favor of the

Defendants, ARIES MARINE CORPORATION and SUPERIOR OIL COMPANY, against the Plaintiff, JOHN LORMAND, dismissing the Plaintiff's complaint with prejudice, and condemning Plaintiff to pay the costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to the provisions of the Federal Rules of Civil Procedure, Rules 40, 54 and 58, that there be judgment herein in favor of cross-defendant, ARIES MARINE CORPORATION, against cross-claimant SUPERIOR OIL COMPANY, dismissing cross-claimant's complaint with prejudice, and condemning cross-claimant to pay the costs of these proceedings.

LAFAYETTE, LOUISIANA, this 21 day of March 1985.

s/s John M. Duhe, Jr.
UNITED STATES DISTRICT JUDGE

Judgment Entered 3-25-85
By s/s L J Sprott
Copy To Severance, McBride,
Buergler, Bivins,
Spencer, Provosty
(stamp)
(names penned in)

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-388

In the Supreme Court of the United States

OCTOBER TERM 1987

JOHN LORMAND,

Petitioner

VERSUS

THE SUPERIOR OIL COMPANY, ET AL.,

Respondents

Petition for a Writ of Certiorari
to the United State Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Corporation, Respondent

QUESTIONS PRESENTED FOR REVIEW

Petitioner presents three questions for review. Question 1 pertains to seaman status under the Jones Act, 46 U.S.C. § 688. Petitioner asserts a conflict between the circuits as the reason for a grant of certiorari. Despite Petitioner's assertion, this is not a proper case to resolve any alleged conflict. Under none of the tests for seaman status can Petitioner be found a seaman.

Questions 2 and 3 do not involve any conflict of the circuits or other compelling questions of law for resolution. Petitioner merely seeks further appellate review of the decisions of the two lower courts.

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STATEMENT OF JURISDICTION

Respondent agrees that this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254; however, respondent respectfully submits that the questions and issues presented for review do not fall within the parameters set forth in Rule 17.1 of the Rules of the Supreme Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. Rule 17.1(a), Supreme Court Rules. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a

departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *[1]

STATEMENT OF THE CASE

Petitioner, John Lormand, was working as a construction welder on a stationary oil and gas platform in the Gulf of Mexico at the time of his injury. At that time, a special function jackup vessel was utilized in conjunction with the platform welding/construction activity. As is more fully set forth below, Petitioner performed no vessel related activities on the jackup vessel and conducted no more than fourteen percent (14%) of his total work activity with the use of jackup vessels.

Petitioner was allegedly injured on November 16, 1982, while employed as a welder with the construction division of International Mooring & Marine ("IM&M"). Petitioner's employer, IM&M, had entered into a construction contract with Superior Oil Company

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[1]28 U.S.C.A. Supreme Court Rule 17.1(b) and (c) are omitted since they are not at issue in this Opposition.

("Superior") to provide welding and construction services on various stationary platforms owned by Superior located in the Gulf of Mexico on the Outer Continental Shelf off the coast of Cameron, Louisiana. Superior also contracted with Respondent, Aries Marine Corporation ("Aries"), to provide a special purpose "jackup" vessel, M/V RAM V, owned and operated by Aries. M/V RAM V was equipped with retractible legs which could be jacked down to the ocean floor to enable the vessel to be fixed into position for the purpose of providing a stationary work platform adjacent to the platform facility. M/V RAM V also provided transportation for the IM&M construction crew to the various Superior platforms as well as living quarters, meals and work space for the IM&M crew.

Aries provided an entirely separate crew to navigate, maintain and operate the jackup vessel when the vessel was being mobilized for transportation or positioning alongside the stationary Superior platforms. None of the IM&M construction employees, including petitioner, performed any function on board M/V RAM V pertaining

to the navigation, maintenance or operation of the vessel or its appurtenances. The only vessel equipment operated by IM&M personnel was a crane situated on M/V RAM V for purposes of positioning and hoisting construction material on the various stationary platforms after the vessel was jacked up into a stationary position next to the platform. The crane was also used to hoist the gangway into position between the vessel and the platform. Lormand was allegedly injured when the gangway upon which he was working fell from its position between the vessel and platform into the water below.

From the time that petitioner was hired by IM&M to work as a welder and welder foreman in its construction division in January of 1980 to the time of his accident in November of 1982, he worked 354 out of a total of 419 work days performing welding work on fixed oil and gas platforms located onshore and in the Gulf of Mexico. During that two-year period of employment, petitioner spent only sixty-five (65) non-consecutive days performing welding work on fixed oil and gas platforms which involved the use of jackup vessels. At

the time of the incident in question, petitioner was working as a welder performing repair work to a stationary platform with the use of the jackup vessel, M/V RAM V.

Petitioner presented no evidence disputing the fact that Lormand was merely a transient construction worker who performed the vast majority of his welding work onshore and aboard fixed oil and gas platforms. Moreover, there was no evidence presented indicating that petitioner or his crew performed any vessel-related activities such as navigation, engine repair or vessel maintenance throughout the term of Lormand's employment with IM&M from January of 1980 until the time of his accident in November of 1982.

On the basis of these uncontested facts, that petitioner spent eighty-four percent (84%) of his welding activities on fixed platforms and shore-based structures and only sixteen percent (16%) of his welding activity on fixed structures with the assistance of support vessels, the district court found, as a matter of law, that Lormand lacked seaman status because there was

no reasonable evidentiary basis to support a finding that he was a seaman under the Jones Act. He was not permanently assigned to M/V RAM V nor did he perform a substantial part of his work upon that vessel or upon any identifiable fleet of vessels. Summary judgmert was granted denying Lormand seaman status upon these undisputed facts and upon the fact that his presence aboard the jackup barge was transitory and sporadic.

Petitioner's claim against Aries was relegated to a 33 U.S.C. § 905(b) claim and this matter then proceeded to trial before the district court who ruled in favor of Aries holding that the shipowner took all appropriate steps to protect the IM&M employees as longshoremen and further violated no duty to intervene in the operations of IM&M. Specifically, the Court found that the Aries captain took appropriate steps to warn IM&M of a potentially hazardous condition (i.e., the unsecured gangway) and was unaware that the IM&M crew would continue work on the gangway for several hours without taking steps to make sure the gangway was properly secured. The petitioner's accident occurred when the

gangway fell several hours after the Aries ca,tain had taken steps to notify IM&M of the potential hazard and after he had retired to his cabin and was no longer in the vicinity of the construction activity.

SUMMARY OF THE ARGUMENT

Respondent respectfully submits that this matter is not ripe for a thorough delineation of the alleged conflict between the Third, Seventh and Fifth Circuits regarding the test for seaman status. Specifically, a review of the facts and circumstances regarding Lormand's construction employment utilizing the standards for seaman status set forth in the Third and Seventh Circuits would affirm the Fifth Circuit's finding that Lormand's employment activity does not satisfy the requisites for Jones Act seaman status. Accordingly, this case does not present the operative facts which would enable this court to fully explore the alleged conflict between the Third, Seventh and Fifth Circuits. Moreover, in view of the fact that this Court has recently denied a Petition for Writ of Certiorari in International Oilfield Divers, Inc. vs. Pickle, ____ U.S.

____, 107 S.Ct. 939, 93 L.Ed. 2d 989 (1987), where the facts were more compelling for purposes of this Court's review, resolution by this Honorable Court is unwarranted.

The District Court's grant of summary judgment in finding that as a matter of law reasonable people could not draw conflicting inferences from the uncontested fact that Lormand was not a seaman at the time of his injury is well reasoned and is in accordance with admiralty jurisprudence. Furthermore, the Court's finding that the Aries captain did not have the requisite knowledge to interver in and/or the duty to supervise the operations of the IM&M personnel was also accurate, correct and properly decided upon the evidence presented. Accordingly, these issues do not fall within the parameters set forth by Rule 17.1 of the Rules of the Supreme Court in that such issues do not involve nor present a conflict among the Circuit Courts nor does the lower court's decision constitute a departure from the accepted and usual course of judicial proceedings.

ARGUMENT

1. There is a need to resolve a conflict between the Circuit Courts and to define the term "seaman" as used in the Jones Act.

In affirming the ruling of the lower court's denial of seaman status to John Lormand, the Fifth Circuit relied upon the two-part seaman status test originally set forth in Offshore Company vs. Robison, 266 F. 2d 769, 779 (5th Cir. 1959) en banc, and reaffirmed en banc in Barrett vs. Chevron, U.S.A., 781 F. 2d 1067 (5th Cir. 1986). It was found that Lormand's maritime work was transient at best based upon the fact that he performed only fourteen percent (14%) of his work activity aboard vessels. Accordingly, he failed to satisfy the "permanent attachment" and/or "substantial work" prong of the seaman status test. The lower court's decision is well reasoned and in accordance with not only the jurisprudence of the Fifth Circuit but of this Honorable Court as well. Grimes vs. Raymond Concrete Pile Company, 356 U.S. 252, 78 S.Ct. 657, 2 L.Ed. 2d

737 (1958); reh. denied Butler v. Whiteman, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754 (1958).

For purposes of examining Lormand's employment with IM&M in terms of the seaman status issue, it is inconsequential that the Third and Seventh Circuits appear to place more emphasis upon the relationship of the employee with the "navigational function" of the vessel than does the Fifth Circuit. This alleged distinction does not change the result in the case sub judice. Lormand's quest to obtain seaman status would no more pass muster in the Third and Seventh Circuits than it did in the Fifth Circuit.

Applying the Third Circuit's analysis in Simko vs. C&C Marine Maintenance Company, 594 F. 2d 960 (3d Cir. 1979) to the facts of this case, for Lormand to have qualified as a seaman or "a member of the crew within the meaning of the Jones Act", he would have had to present evidence that he worked aboard M/V RAM V primarily to "aid in navigation". Id. at 964. The Third Circuit would have affirmed the lower court's grant of summary judgment denying seaman status

wherein the record is devoid of any proof that Lormand performed any significant navigational functions with respect to M/V RAM V. It is undisputed that Lormand was merely a construction welder with no vessel-related job tasks. Accordingly, under the Third Circuit's test for seaman status, that circuit's review does not conflict with the conclusion reached by the Fifth Circuit.

The district court's finding would have also been affirmed by the Seventh Circuit under its analysis of the test for seaman status. Applying the Seventh Circuit's analysis of seaman status in Johnson vs. John R. Beasley Construction Company, 742 F. 2d 1054 (7th Cir. 1984), Lormand clearly lacked a sufficient relationship to the "transportation function" of M/V RAM V. There was no evidence presented that Lormand performed any vessel-related activities while aboard M/V RAM V. The Seventh Circuit would also have affirmed the lower court's granting of summary judgment because Lormand made no "contribution to the maintenance, operation or welfare of the transportation function" of M/V RAM V. Id. at 1063-64. Clearly, Lormand failed

to meet the second part of the Seventh Circuit's test, i.e., contributing to the "transportation function" of the vessel. Accordingly, the analysis of the Seventh Circuit creates no conflict with the conclusion of the Fifth Circuit denying Lormand seaman status.

It does not help petitioner to observe that the issue of seaman status has not been touched upon since Butler, supra, Grimes, supra, and Gianfala vs. Texas Company, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 2d 775 (1955) reh. denied, 350 U.S. 960, 76 S.Ct. 346, 100 L.Ed. 2d 834. The fact that a given question has not been recently resolved by the Supreme Court does not constitute a recognized basis for this Court to grant certiorari. Ross vs. Moffitt, 417 U.S. 600, 617, 94 S.Ct. 2437, 2447, 41 L.Ed. 2d 341 (1974). Moreover, with respect to this matter, a binding, authoritative decision is unnecessary in light of the fact that the perceived conflicts between the circuits are not germane to the facts and circumstances of Lormand's employment and, accordingly, do not change the result reached by the Fifth Circuit. As indicated above, this case simply does not result in a

thorough delineation of the alleged problems by the other circuits and is of no importance in the overall structure of the seaman status issue. Therefore, no resolution by this Court is necessary or warranted. Finally, this Court's decision to deny certiorari in International Oilfield Divers, Inc. vs. Pickle, ___ U.S. ___, 107 S.Ct. 939, 93 L.Ed. 2d 989 (1987), where the facts were arguably more compelling for this Court's review, further attenuates the necessity for this Court's review.

2. The courts below erred in refusing to adhere to the liberal mandate of the Jones Act and allow the issue of seaman's status to be decided by a jury.

Rule 17.1(a) of this Court regarding considerations governing review on certiorari clearly provides, albeit neither controlling nor fully measuring the Court's discretion, that the Court will consider review of issues (in pertinent part):

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals in the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Rule 17, Supreme Court Rules. 28 U.S C.A.

Absent such an issue as required by Section 1(a) of Rule 17 of the Supreme Court Rules, there is an insufficient basis for this Court exercising its exceptional discretion to grant certiorari. This court should not grant certiorari merely to review evidence and discuss specific facts. U.S. vs. Johnson, 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below are treated with and are entitled to great weight. Regarding Issues No. 2 and 3, petitioner is raising questions turning entirely on the facts of this case, already twice resolved in favor of respondents. These issues do not regard any conflict in the circuits nor do they constitute a departure from the accepted and usual course of judicial proceedings such that would

warrant review by this Court. Even assuming the Courts of Appeals are wrong on these issues, which is denied and not alleged herein, there was not such a departure "from the accepted and usual course of judicial proceedings" so as to call for the exercise of this Court's power of supervision. Cory Corporation vs. Sauber, 363 U.S. 709, 80 S.Ct. 1331, 4 L.Ed. 2d 1508 (1960).

Regarding the merits, however, it must be pointed out that in response to the Motion for Summary Judgment seeking to dismiss Lormand's Jones Act claim, Petitioner provided no contradictory nor countervailing evidence seeking to disprove that he was not permanently assigned to M/V RAM V or that he performed a substantial part of his work on that vessel. Accordingly, where the facts establish beyond question as a matter of law the lack of seaman status, a court may, in the proper case, hold that there is no reasonable evidentiary basis to support a jury finding that the injured person is a seaman under the Jones Act. Barrett vs. Chevron, U.S.A., Inc., 781 F. 2d 1067, 1074 (5th Cir. 1986) en banc. See also, Simko vs. C&C Marine Maintenance Company, 594 F.

2d 960 (3d Cir. 1979) cert. denied 440 U.S. 833 (1979); Peterson vs. Chesapeake vs. Ohio Railway Company, 784 F. 2d 732, 737 (6th Cir. 1986); Ramos vs. Universal Dredging Corporation, 547 F. Supp. 661 (D.Hi. 1982). Accordingly, absent other factors besides the perceived incorrectness of the judgment of the Fifth Circuit, this issue does not warrant this Court's attention.

3. The captain's conduct created liability under 33 U.S.C.A., Section 905(b).

As with Issue No. 2, the question petitioner raises turns on the particular facts of this case alone and is of interest only to the parties to it. In essence, petitioner asks this Court to make a third review of the trial record to see if he can find what two previous Courts have been unable to find. Again, the opinion below was accurate and correct and the result was fair and in accordance with the prevailing admiralty law. See Scindia Steam Navigation Company vs. De Los

Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed. 2d 1 (1981), and its progeny.

Scindia specifically relieves the vessel owner of any duty, absent custom, law or contractual provision to the contrary, to inspect or supervise the operations of the stevedores or another independent contractor's employees. Scindia, 451 U.S. at 172, 101 S.Ct. at 1624. However, the shipowner has a duty to intervene with respect to obvious dangers that arise in areas outside his control after the workers' operations have begun only when he has (1) actual knowledge that a dangerous condition exists and (2) actual knowledge that the stevedore or independent contractor, or its employees, cannot be relied upon to remedy the condition, and that if not remedied it will pose a substantial risk of injury. Id. at 1626-27; Barrios vs. Pelham Marine, Inc., 796 F. 2d 128, 131 (5th Cir. 1986).

The Fifth Circuit affirmed the lower court's finding that the Aries captain satisfied his duty by informing an IM&M worker that the gangway was not properly attached to the vessel and posed a potential risk. The

facts clearly indicated that the IM&M worker assured the vessel captain that the gangway would not pose a hazard. The lower courts' decision that the captain lacked the requisite knowledge that the gangway posed a hazard at the time of petitioner's accident such that he did not have a duty to intervene at that time is accurately supported by the fact that the captain had retired to his quarters and was not in the vicinity of the gangway at the time of Lormand's accident several hours later. Clearly, the decision of the Court is free of error. More importantly, however, it does not justify this Court's review as it does not contain substantially important issues to warrant this Court's attention.

CONCLUSION

There are no issues in this matter sufficient to compel a review by this Honorable Court. The decision of the Fifth Circuit to affirm the lower court's finding that John Lormand's work aboard M/V RAM V failed to satisfy the requisites for seaman status creates no conflict with the Third and Seventh Circuits' test for

seaman status. In fact, the Third and Seventh Circuits would likewise affirm the lower court's granting of summary judgment finding that John Lormand had failed to satisfy the requisites for seaman status as there was no evidence presented that he worked aboard M/V RAM V to "aid in navigation" or contributed to the "transportation function" of the vessel. The facts and circumstances of this matter clearly do not create a conflict among the circuits which would justify this Court's review.

The remaining issues regarding the lower court's grant of summary judgment and its finding of no liability on the part of the vessel captain under § 905(b) of Title 33 U.S.C., merely raise questions turning entirely upon the facts of this case and do not regard any conflict in the circuits nor constitute a departure from the accepted and usual course of judicial proceedings. Accordingly, there is no basis for this Court to exercise its exceptional discretion to grant certiorari on these issues. The lower courts' decisions are well reasoned

and based upon the facts presented and jurisprudence of this Honorable Court.

For the above and foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

JOHN LORMAND *v.* ARIES MARINE CORPORATION ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87–388. Decided January 19, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue here is the proper definition of seaman status under the Jones Act. Petitioner, an employee for a welding company, was injured while working aboard a barge. He brought suit in District Court against his employer and the owner of the barge. The suit was unsuccessful, and in particular the District Court granted summary judgment for petitioner's employer on the Jones Act claim, ruling that petitioner was not a "seaman" as that term is used in 46 U. S. C. § 688. The Fifth Circuit affirmed on appeal, adhering to the test for determining seaman status that it had recently stated in an *en banc* decision. *Lormand* v. *Superior Oil Co.*, Civ. Action No. 85–4278 (CA5, June 5, 1987), citing *Barrett* v. *Chevron U. S. A., Inc.*, 781 F. 2d 1067 (CA5 1986) (en banc). Judge Rubin stated that he concurred in the opinion only because he was bound to do so by the *Barrett* decision, though he continued to adhere to his dissent in *Barrett*. Judge Brown concurred separately on a different issue.

In *Barrett*, the Fifth Circuit as a whole reaffirmed its adherence to the test it had followed for almost 30 years, which states that to qualify as a "seaman" a person must either be assigned permanently to a vessel or perform a substantial part of his work aboard it, and also that the person's duties or capacities must contribute to the function of the vessel or to the accomplishment of its mission. *Barrett*, *supra*, at 1070–1074; *Offshore Co.* v. *Robinson*, 266 F. 2d 769 (CA5 1959). Of the eight judges who formed the majority in *Bar-*

rett, however, four concurred specially, noting that they joined the majority only to establish a firm rule but would have preferred to adopt the test formulated by the Seventh Circuit, which puts the issue of seaman status to a jury whenever the person "had a more or less permanent connection with a vessel in navigation" and "made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." *Johnson* v. *John F. Beasley Constr. Co.*, 742 F. 2d 1054, 1063 (CA7), cert. denied, 469 U. S. 1211 (1985). Judge Rubin dissented, joined by five other judges, stating that the *Robinson* test should be supplemented by considering the person's status not only in light of his permanent job assignment but also in light of any assignment imposed on him for a hitch of more limited duration. *Barrett*, *supra*, at 1077–1078.

The test used by the Fifth Circuit to determine seaman status is inconsistent with the test used by the Seventh Circuit. In addition, the Third Circuit has formulated the second part of the *Robinson* test as whether the person is aboard the vessel "primarily to aid in its navigation." *Simko* v. *C. & C. Marine Maintenance Co.*, 594 F. 2d 960, 964 (CA3), cert. denied, 444 U. S. 833 (1979). The split among the Circuits on this issue warrants our granting certiorari.